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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 583

D. B. ANDERS,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on June 20, 1969, rehearing denied on August 6, 1969.

CITATION TO OPINION BELOW

The opinion of the Tax Court of the United States, printed in Appendix B-1 hereto, infra, Page A3, is reported at 48 TC 815. The opinion of the Court of Appeals for the Tenth Circuit, printed in Appendix B-2 hereto, infra, Page A18, is reported in ..... F.2d ..... (69-2 USTC, Para. 9478) (24 AFTR 2d, Para. 69-5043), rehearing denied at ..... F.2d ..... (69-2 USTC, Para. 9573), printed in Appendix B-3, Page A28, infra.

JURISDICTION

The judgment of the Court of Appeals was dated and entered June 20, 1969, Appendix B-2, Page A18, infra. Petitioner's timely petition for rehearing was denied on August 6, 1969, Appendix B-3, Page A28, infra. The jurisdiction of this court is invoked under 28 USC Sec. 1254(1) and 26 USC Sec. 7482(a). The jurisdiction of the Tax Court of the United States was based on 26 USC Sec. 7442 and 26 USC Sec. 6212 as an action for the redetermination of a deficiency in income taxes previously determined by the Commissioner of Internal Revenue.

QUESTION PRESENTED

Whether the Court of Appeals for the Tenth Circuit erred in holding that certain of a corporation's gain from the sale of rental property did not qualify for the non-recognition provisions under Sec. 337 of the Internal Revenue Code of 1954 where:

(1) The corporation had consistently charged to its expense accounts when purchased the cost of the property used in conducting its industrial laundry rental business;

(2) At the end of each taxable year the corporation credited the expense account with the cost of the ending

inventory of property which had not been placed in use at the end of such taxable year; and

(3) The aforesaid accounting method used by the corporation was not challenged by the Internal Revenue Service for the taxable year in question, nor for prior taxable years.

STATUTE INVOLVED

The statutory provision involved is Sec. 337(a)(b) and (c) of the Internal Revenue Code of 1954, 26 USC, Sec. 337(a)(b) and (c), 68A Stat. at Page 106. Said statute is printed in Appendix A-1, infra, Pages A1 to A3, inclusive.

The regulation involved is Reg. Sec. 1.337-3(a), 26 CFR, Sec. 1.337-3(a), Page 69. Such regulation is printed in Appendix A-2, infra Page A3.

STATEMENT OF CASE

Petitioner commenced this action in the Tax Court of the United States under 26 USC Sec. 7442 and 26 USC Sec. 6212 for the redetermination of a deficiency in income taxes for the year ended July 31, 1961, as determined by the Commissioner of Internal Revenue.

In the notice of deficiency, the respondent determined a deficiency in income taxes of D. B. Anders, Inc., for the taxable year ended July 31, 1961, in the amount of $121,160.00 and he notified Petitioner that the deficiency and interest, constituting the Petitioner's liability as the transferee of assets of the corporation, would be assessed against the Petitioner. (The Petitioner admits that he stands in the shoes of D. B. Anders, Inc., insofar as any determination of the income tax issue involved in this case is concerned.) The Petitioner owned all of the stock of Service Industrial Clean-

ers, Inc., a Kansas corporation which in 1961 changed its name to D. B. Anders, Inc. (hereinafter referred to as "Service" or the "Corporation").

Prior to 1951, Service's business consisted primarily of the laundering of industrial uniforms and other items belonging to its customers, which type of business is referred to in the trade as "NOG," meaning "Not-Our-Goods." (R 95, 96). Service began the rental business of garments and other property in 1951 (R 96). The corporation was engaged in the business of conducting and providing a rental service of cleaned and laundered towels, seat covers, fender covers, wiping materials and dust cloths, coats, coveralls, shirts, pants and other textiles and apparels, including dusting and wiping equipment, sweeping tools, mops and accessories, as well as conducting a cleaning and laundering service of substantially the same types of property owned by others. In the taxable year ended July 31, 1961 (prior to May 1961 when the corporation sold its assets), some eighty to eighty-seven percent of the corporation's business was attributable to laundry-rental business (R 35-36, 46-47).

Service's garment rental business consisted of furnishing laundered shirts, trousers, coveralls and related items to its customers on a periodic basis (Exhibits 10, 11, 12). Its principal garment customers were General Motors, Ford Motor Company, Trans-World Airlines, Bendix and industries of that type. In addition, garment service was provided for such customers as garages, florists, cemeteries, filling stations, motor car dealers and small manufacturers (R 96, 98, 147). In 1961, Service had approximately 40,000 garments in circulation in its rental business (R 103, 104).

Service's shop towel rental business consisted of furnishing laundered shop towels to its customers on a pe-

riodic basis. Shop towels are made of absorbent cotton material and are used in industry for wiping oil and greases (Exhibits 13, 14, 15; R 97). Its principal shop towel customers were railroads, pipe lines and industries of that type (R 97). Service's principal railroad customer was the Union Pacific Railroad which was serviced on a system-wide basis from Service's plant in Kansas City (R 98).

For Federal income tax purposes, Service charged to its expense accounts when purchased the cost of the garments and other property used in conducting its industrial laundry rental business. At the end of each taxable year, the expense accounts were credited with the costs of the ending inventories of property which had not been placed in use at the end of such taxable year (R 36, 37, 137, 138). Service's annual replacement costs of garments and other property used in the rental business averaged approximately $200,000.00 per year (R 100, 48, 41).

The previously mentioned accounting method used by Service in accounting for replacement costs for Federal income tax purposes was not challenged by the Internal Revenue Service for the taxable year ended July 31, 1961, nor for prior taxable years (R 61, 141). Service had a zero basis in these assets (R 142). Other assets involved in the sale to be hereinafter mentioned also had a zero basis (R 143).

On May 16, 1961, Service entered into an "agreement of sale" with four individuals for the sale of the assets of the business, including patronage and goodwill, for the total sum of $509,500.00. The parties agreed that this did not include new, unused and unwashed garments and rental property and that there would be added to the price an amount equal to the seller's cost of such property (R 49-50).

The sale by Service of its assets was completed on or about May 22, and 23, 1961 and pursuant to a plan of liquidation adopted by Service, the corporation distributed all of its assets in complete liquidation to the Petitioner, its sole stockholder, within the 12-month period beginning May 12, 1961. In April, 1962, the corporation filed a resolution of dissolution with the Secretary of State of Kansas and its corporate existence ceased (R 38, 50).

On its income tax return for the fiscal year ended July 31, 1961, the corporation reported a gain of $446,601.89 arising out of the sale of the assets to the buyers and it claimed exclusion of such gain from taxable income under Sec. 337 of the Internal Revenue Code of 1954. The amount of gain reported, and for which exclusion from taxation was claimed, included $233,000.00 as the amount of the consideration received under the terms of the sales agreement by Service allocated to the rental property in use at the time of sale (R 51).

The Tax Court found in favor of the Petitioner, stating that the sole issue was whether in a liquidation under Sec. 337 of the Internal Revenue Code of 1954, the corporation is entitled to the nonrecognition of gain on property, the cost of which had previously been deducted as an expense. The respondent duly perfected an appeal to the Court of Appeals for the Tenth Circuit, which court reversed, finding as a matter of law that the so-called tax benefit rule precluded nonrecognition under Sec. 337 of the Internal Revenue Code of 1954, such judgment being entered on June 20, 1969. The Petitioner thereupon filed a timely petition for rehearing which was denied by the Court of Appeals on August 6, 1969 (Appendix B-3, infra, Page A28).

REASONS FOR GRANTING THE WRIT

The question presented, i.e., whether the entire amount of the gain realized by Service on the sale of its assets to the buyers is properly excluded from taxable income, as the clearly expressed intention of Congress, under Sec. 337 of the Internal Revenue Code, as Petitioner contends; or whether a portion of the gain realized, namely the $233,000.00 realized from the sale of the tangible personal property then in use in the corporation's rental business, is includible in income by reason of the creation of a judicial exception to Sec. 337, notwithstanding the clear language of that statute (namely the "tax benefit rule"), is an issue which is of significant national importance. This case is a case of first impression and settlement of the question by this court is plainly in the public interest, since it is currently involved in numerous proceedings both before the Internal Revenue Service and in the various courts which have jurisdiction of income tax matters as is shown by the following table of pending matters:

Case Name	Status Before Court Or Before Internal Revenue Service	Amount In Issue
1. *Spitalny* v. *U.S.*, 288 F. Supp. 650 (D. Ariz. 1968)	Appeal pending before United States Court of Appeals for Ninth Circuit.	$110,409.71
2. *S. E. Evans, Inc.* v. *U. S.*, No. FS-69-C-27 (W. D. Arkansas)	Pending on motions for summary judgment filed on behalf of both plaintiff and defendant.	$102,377.34
3. *Steel Parts Corporation* v. *C.I.R.*, Tax Court Docket No. 2085-69	At issue and ready for trial before Tax Court of the United States.	$599,538.99

4. *Estate of Henry Sagemuller*	Pending on district conference before District Director, Omaha, Nebraska.	$16,552.61
5. *Donzel D. Bowman, et al.*	Pending on district conference before District Director, Omaha, Nebraska.	$9,508.07
6. *Gritsch Corporation*	Claim for refund disallowed by IRS San Francisco, California office September 1968.	$17,004.00

In addition, the opinion of the Court of Appeals has departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision, i.e., namely the Court of Appeals has created a judicial exception to a clear and unambiguous statute and regulation. Section 337 of the Internal Revenue Code of 1954, 26 USC Sec. 337, first enacted in 1954, provides that if a corporation adopts a plan of complete liquidation on or after June 22, 1954, and within a 12-month period beginning on the date of the adoption of the plan, all of the assets of the corporation, less those retained to meet claims, are distributed in complete liquidation, then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such 12-month period.

The purpose of the inclusion of Section 337 in the 1954 Code was to deal with the so-called "Court Holding Company" problem. Prior to the enactment of Section 337 if a sale of assets was made in connection with the liquidation of a corporation, it was necessary to determine whether the sale was made by the corporation, in which case liabilities for two income taxes, one on the corporate level and one on the shareholder level, were incurred, or

whether the assets were first distributed to the shareholders and the sale made by the shareholders themselves, in which case only the shareholder's tax applied. The purpose of Section 337 was aimed at eliminating the uncertainties attendant upon the Supreme Court decision in *Commissioner* v. *Court Holding Co.*, 324 U.S. 331 (1945), and *United States* v. *Cumberland Public Service Co.*, 338 U.S. 451 (1950). The enactment of Section 337 was to make moot the question as to whether a sale of assets was accomplished by the corporation or its stockholders. See *Frank W. Verito*, 43 T.C. 429, 437-39 (1965).

There is no dispute in this case with respect to the facts attendant to the complete liquidation of Service. On May 12, 1961, Service adopted a plan of liquidation pursuant to Section 337 of the Internal Revenue Code (R 37, 176). Subsequent to the adoption of the plan, on May 16, 1961, Service entered into an agreement of sale with Albert Gitlow, Abraham Gitlow, Ben E. Singer, and Joseph L. Fradkin, acting in behalf of Service Industrial Cleaners, Inc., a Kansas corporation formed on May 17, 1961 (the Buyer), for the sale to Buyer of substantially all the assets of Service (R 37, 188). Pursuant to said agreement Service sold to Buyer on May 22 and 23, 1961, substantially all its assets including its plant and office equipment, real estate, goodwill, its entire inventory of garments, shop towels, fender and seat covers, and dust control items in use in its laundry rental business, its accounts receivable, and its inventory of new articles which had not yet been placed in service to the customer (R 38, 188).

The decision of the Court of Appeals for the Tenth Circuit necessarily is founded solely on its so-called "tax benefit theory." It is apparent from examining Exhibits 10 through 18 that the corporation sold tangible personal property. If as this court has recently stated, the words

of statutes, including revenue acts, should be interpreted where possible in ordinary everyday sense, the term "property" as used in Section 337 certainly embraces tangible personal property. *Malat* v. *Riddell*, 383 U.S. 569 at 571 (1966). Furthermore, the technical definition of property set out in Sec. 337 and the regulation promulgated thereunder is equally persuasive. Section 337 defines "property" by a process of exclusion. Section 337(b)(1) states that, for the purpose of the nonrecognition of gain provision of Section 337(a), the term "property" does *not* include:

> "(A) stock in trade of the corporation, or other property of a kind which would properly be included in the inventory of the corporation if on hand at the close of the taxable year, and property held by the corporation primarily for sale to customers in the ordinary course of its trade or business,
>
> (B) installment obligations acquired in respect of the sale or exchange (without regard to whether such sale or exchange occurred before, on, or after the date of the adoption of the plan referred to in subsection (a)) of stock in trade or other property described in subparagraph (A) of this paragraph, and
>
> (C) installment obligations acquired in respect of property (other than property described in subparagraph (A)) sold or exchanged before the date of the adoption of such plan of liquidation."

The legislative history of Section 337 does not contain any discussion of the term "property" beyond the basic statutory definition. 3 U.S. Code Cong. & Adm. News 4244, 4896 (83rd Cong., 2d Sess. 1954). Petitioner, in his Regulations, U.S. Treas. Reg., Sec. 1.337-3(a), defines "property" as follows:

> "(a) Except as provided in section 337(b)(2) and this section, the term 'property' as used in section

337(a) and section 1.337-1 does not include, (1) stock in trade of the corporation, or other property of a kind which would properly be included in the inventory of the corporation if on hand at the close of the taxable year and property held by the corporation primarily for sale to customers in the ordinary course of its trade or business (hereinafter for purposes of section 337 referred to as 'inventory'), (2) installment obligations acquired at any time from the sale or exchange of inventory, or (3) installment obligations acquired from the sale or exchange of property (other than inventory) prior to the adoption of the plan of liquidation. *With the exceptions listed in this paragraph, the term 'property' includes all assets owned by a corporation.*" (Emphasis supplied). (Adopted 12 2/55 by T.D. 6152).

The installment obligations exception of Section 337(b)(1)(B) and Section 337(b)(1)(C) clearly have no applicability to the case at bar. It is clear that the Court of Appeals does not find that any of the exceptions to the statutory definition of the word "property" are applicable to the Petitioner. Furthermore, even if such exceptions were applicable, under the specific provisions of Sec. 337 a disposition of such assets in a sale in one transaction precludes recognition of gain and such property, even though inventory, et cetera, is included as property. Sec. 337(b)(1)(A). This exception for so-called bulk sales of inventory was added by the Senate so that Sec. 337 "more nearly corresponds to the results that would follow a sale of all the corporate assets (including the inventory) and the sale of all the stock." S.Rep.No. 1622, 83rd Congress, 2nd Sess., 1954, 3 U.S. Code Cong. and Adm. News 4621, at 4680.

In addition, no contention was made by the Court of Appeals that there had not been a "sale" of such assets and under a decision of this court there could be little

doubt that there was a sale since a sale in the ordinary sense of the word, is a transfer of property for a fixed price in money. *Commissioner of Internal Revenue* v. *Brown*, 380 U.S. 563 (1965). Thus, the Court of Appeals really ruled in the instant case that property was sold in a duly executed Sec. 337 liquidation and sale but that by reason of the "tax benefit rule," Sec. 337 need not be followed. The gist of the Court's opinion is contained in the revision to its opinion which resulted from the Petitioner's petition for rehearing where the Court states at modified Page 3 of its opinion:

> ". . . We conclude that the fact that a transaction involves the disposition of property within the meaning of Sec. 337 does not compel treatment of the proceeds from it as gain from a transfer of the property. . . . Where the cost of the property was fully expensed and deducted for tax purposes, tax benefit principles reasonably call for treatment of the proceeds as recoupment of the prior charges and ordinary income. By Sec. 337 Congress showed no intention to discard such principles."

The decision which is usually relied upon as a basis for the tax benefit rule is *Dobson* v. *Commissioner*, 320 U.S. 489 (1943). If *Dobson* be the parent of child known as the "tax benefit rule," then apparently the parent does not acknowledge the child. In the course of the *Dobson* opinion this Court stated at Page 506:

> ". . . We are not adopting any rule of tax benefits."

Despite this express disclaimer, the Court of Appeals in the instant case applied the tax benefit rule as an unwavering principle of law which must be followed even in the face of express unambiguous language from Congress. As clearly indicated in the previous quotation from *Dobson*, there is no such rule. Other Courts of Appeal

have also clearly indicated that there is no such rule. In *Reynolds* v. *Boos*, 188 F.2d 322 (8th Cir. 1951) the court stated at Pages 325 and 326 as follows:

> "What it apparently is here sought to get established is an absolute rule of liability in any case of tax benefits. Individual situations may perhaps exist where a liability soundly can be found to be present because of some previous tax benefit, but there is no such general or blanket principle of tax liability. The Supreme Court specifically said in *Dobson* . . . 'We are not adopting any rule of tax benefits.'"

Furthermore, if the respondent's position and the position of the Court of Appeals is to be consistent, the tax benefit theory must mean that one would always lose depreciation in the year of sale in a Sec. 337 liquidation. If this were not the case, the taxpayer would receive a "tax benefit" for which he received reimbursement in the year of sale. However, this court has refused to follow that theory in a Sec. 337 liquidation. *Fribourg Navigation Company, Inc.* v. *Commissioner of Internal Revenue*, 383 U.S. 272 (1966). Petitioner submits that the rationale of *Fribourg* is that since prior to the adoption of Sec. 1245 of the Internal Revenue Code in 1962, Congress had not provided for the recapture of depreciation in the year of sale, and since Sec. 337 provided for nonrecognition on the gain of the sale of assets, it necessarily followed that if useful life and salvage value were correct, then depreciation must be allowed in the year of sale. The gist of the *Fribourg* case as stated in 383 U.S. at Page 285 is:

> ". . . For post-1962 transactions Sec. 1245 applies to the situation which occurred in the instant case and would produce greater revenue. The taxpayer must report as ordinary income *all* depreciation recouped on sale, and this notwithstanding that the sale was part of a nonrecognition liquidation within Sec. 337. . . ." (Emphasis that of Court).

In short, Congress has specifically provided by statute that all gain on the sale of property owned by a corporation involved in a Sec. 337 liquidation (including even inventory and property held for sale if sold in one transaction) benefits from Sec. 337 in the sense that no gain is recognized by the corporate taxpayer. The only exclusions are those expressly stated in the statute such as inventory sold in more than one transaction. Furthermore, the regulation promulgated pursuant to that statute quite clearly follows the statute and concludes with the statement "with the exceptions listed in this paragraph, the term 'property' includes all assets owned by a corporation." Reg. 1.337-3(a). The Petitioner submits that to engraft onto an unambiguous statute of Congress and onto an unambiguous regulation properly adopted pursuant to that statute an exception under the "tax benefit rule" is an improper judicial function. If the purpose be to close a so-called tax "loophole" (which seems to be a popular topic of conversation during this era), then Congress certainly has it within its power to amend Sec. 337 to close that loophole. Courts should not legislate to do other than what Congress intended by an unambiguous Sec. 337.

The erroneous interpretation of the Court of Appeals in the instant case is best illustrated by the authorities relied upon in its opinion. The opinion of the Tax Court below (48 T.C. at 822, 823) clearly distinguished *Commissioner* v. *First State Bank of Stratford*, 168 F.2d 1004 (5th Cir. 1948), *cert. denied* 335 U.S. 867 (1948) and *West Seattle National Bank of Seattle* v. *Commissioner*, 288 F.2d 47 (9th Cir. 1961), and the Court of Appeals did nothing to point out any respect in which the Tax Court erred in so doing. The comments made by the Tax Court with respect to *First State Bank of Stratford* are equally applicable to

Merchants National Bank of Mobile v. *Commissioner,* 199 F.2d 657 (5th Cir. 1952). *Citizens Federal Savings and Loan Association of Cleveland* v. *United States,* 290 F.2d 932, 936 (Ct. Cl. 1961), states that the income there involved did not arise from the sale of assets. Nor was there any sale or exchange in *Alice Phelan Sullivan Corporation* v. *United States,* 381 F.2d 399, 402 (Ct. Cl. 1967) or *Lloyd H. Faidley,* 8 T.C. 1170 (1947). *Monday* v. *Commissioner,* decided January 2, 1957 (P-H Memo T.C., par. 57,001), *affirmed per curiam,* 252 F.2d 789, *cert. denied,* 358 U.S. 883, does not even remotely involve the tax benefit rule, let alone the application of the tax benefit rule to gain realized from a sale.

As stated previously in this petition the issue involved in this action is national in scope. Some indication of the scope of that issue is illustrated by a recent District Court opinion which followed the Tax Court decision in the instant case. *Spitalny* v. *United States,* 288 F.Supp. 650 (D. Ariz. 1968), on appeal to the Court of Appeals for Ninth Circuit. That decision involved a supposed deficiency in Federal taxes of $110,409.71. In an opinion written by a respected member of the judiciary who was a past president of the American Bar Association, the theory of the Tax Court's opinion in the instant case was followed completely. It is therefore apparent from the *Spitalny* case and the cases previously referred to as now pending involving this issue, that the issue is national in scope involving a considerable sum of money in the aggregate. Furthermore, the Petitioner submits that most of the cases pending on this issue can be disposed of as a matter of law, since there is usually no question that the particular item involved, such as the property rented in the instant case, was charged to expense. (Petitioner is advised for instance that the case of *S. E. Evans, Inc.* v. *U. S.,* referred to in

the table at pages 7-8 above is now pending on the motions for summary judgment on behalf of both the taxpayer and United States with the only issue of law being whether or not the tax benefit rule is an exception to Sec. 337.) Obviously, this issue apparently is one upon which members of the judiciary at the lower level will have disagreement. Also, it is an issue which will continue to recur so long as Sec. 337 remains a part of the Internal Revenue Code, said section having been at first adopted in 1954. Such being the case, the Petitioner submits that settlement of the issue involved in the instant case is plainly in the general public interest, and Petitioner further submits that a determination of whether or not a judicially engrafted exception (the tax benefit rule) can be used to modify a clear and unambiguous taxing statute passed by Congress is also in the national interest. In other words, the instant case raises an important question in the administration of the revenue laws. This court has indicated that such a question is reason enough to grant a petition for certiorari. *United States* v. *Korpan*, 354 U.S. 271 (1957), reh. den. 354 U.S. 945. There, this court stated at Page 273:

> ". . . we granted certiorari because the case raised important questions in the administration of the revenue laws. . . ."

The Petitioner further submits that the position taken by the Commissioner of Internal Revenue in the instant case represents a sudden and unwarranted change of position from a consistent administrative practice followed prior to 1961. As has been mentioned previously the regulation which the Commissioner of Internal Revenue adopted under Sec. 337 quite expressly defines property as including all assets owned by a corporation. Reg. 1.337-3(a) (Adopted 12/2/55 by T.D. 6152). Graphic evidence of the fact that the Commissioner specifically intended exactly

what he said in his regulation is contained in Rev. Rul. 59-308, *Cum. Bull.* 1959-2, Page 110, where the Commissioner had a request made to him as to the proper tax treatment of the sale of amortized emergency facilities where the sale was made by a corporation under a Sec. 337 liquidation. Deductions had been taken upon the facilities under Sec. 168 of the Internal Revenue Code over a period of 60 months, amortizing the entire adjusted basis in such assets. (In other words the assets had a zero basis.) Yet the ruling states that such property was protected by the non-recognition provisions of Sec. 337. Specifically, the ruling states at Page 111:

> "There is no provision in Sec. 1238 of the Code which requires gain to be recognized. That section only classifies part or all of the gain, when recognized, as ordinary gain rather than capital gain. Section 337 of the Code provides for the nonrecognition of the gain from the sale of property of the corporation in connection with a liquidation meeting the requirements of that section. Emergency facilities, not having been specifically excluded from the definition of 'property' as used in Section 337(a) of the Code, are included in that term."

The first departure by the Commissioner of Internal Revenue from such position was taken in Rev. Rul. 61-214, 1961-2 *Cum. Bull.*, Page 60. That ruling involved an office building corporation which adopted a plan of complete liquidation under Sec. 337. Included in the assets sold were a pile of coal, plumbing supplies and small tools. The costs of such items had been deducted in prior years. The Commissioner held that the consideration received for such items was taxable as ordinary income. Petitioner assumes that the theory of the latter ruling is that the so-called "tax benefit rule" is an exception to Sec. 337. If this be the case, it is an exception which the Commissioner did not recognize either in his regulation or in Rev. Rul. 59-308,

which ruling has never been revoked or modified by the Commissioner of Internal Revenue. Petitioner submits that to the extent that Rev. Rul. 61-214 attempts to engraft onto Sec. 337 an exception not provided by Congress, that the revenue ruling is invalid, and for the same reason that the Court of Appeals' decision is incorrect.

Petitioner's position in this regard is contained in the opinion of the Tax Court where the Court stated at 48 T.C. at Page 821 as follows:

> "In support of his contention that the tax-benefit rule is applicable here, respondent has cited Rev. Rul. 61-214, 1961-2 C.B. 60, wherein it was held that a portion of the proceeds received by an office building corporation, in a sale in complete liquidation, for a stockpile of coal, plumbing supplies, and small tools, the cost of which had been deducted in prior years, was to be treated as ordinary income under section 61 and not as nonrecognized gain under section 337(a).[4]
>
> This ruling is no more than an expression of the opinion or position of the Internal Revenue Service with respect to the law applicable to the facts recited therein and does not have the force of law. See the preface to the Cumulative Bulletin; Rogovin (then Chief Counsel, I.R.S.), 'The Four R's: Regulations, Rulings, Reliance and Retroactivity—A View From Within,' 43 Taxes 756 (Dec. 1965); *Pictorial Review Co.* v. *Helvering*, 68 F.2d 766, 768; *Radiant Glass Co.* v. *Burnett*, 54 F.2d 718, affirming 16 B.T.A. 610; *Bush* #1, 48 T.C. 218, 232.

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4. In Rev. Rul. 59-308, 1959-2 C.B. 110, respondent held that no taxable gain was to be recognized by a corporation, under sec. 337, from the sale during the period of liquidation of emergency facilities amortized under sec. 168 of the Code. In the stated case the property had been completely amortized. In that ruling respondent conceded that the facilities, not having been specifically excluded from the definition of "property" as used in sec. 337, were included in that term (Court's footnote).

> Though noted 'without comment' in *Hollywood Baseball Association*, 42 T.C. 234, 262 fn. 6, affd. 352 F.2d 350 (C.A. 9, 1965), vacated and remanded 383 U.S. 824, Rev. Rul. 61-214 has not to our knowledge been approved by any court. The conclusions reached are not supported by the authorities cited therein, are clearly contrary to the provisions of section 337(a) and, in our opinion, are not a valid interpretation of the statute. See Gutkin & Beck, 'Section 337: IRS Wrong in Taxing, at Time of Liquidation, Items Previously Deducted.' 17 J. Taxation 146."

Neither the respondent nor the Court of Appeals can seriously contend that there was no "sale" in the instant case. Neither the respondent nor the Court of Appeals can seriously argue that the sale was not of "property." The only basis upon which the position of the respondent can be sustained and upon which the decision of the Court of Appeals can be sustained is by reading into Sec. 337 a judicial exception, namely the tax benefit rule. However, such a position is in direct conflict with the Commissioner's own Reg. 1.337-3(a) and Rev. Rul. 59-308, supra, which regulation and ruling Petitioner submits are a correct interpretation of a clear and unambiguous statute created by Congress.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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